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DANIEL WARMENHOVEN

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DANIEL WARMENHOVEN,
Plaintiff,

v.

NETAPP, INC., A DELAWARE
CORPORATION, NETAPP EXECUTIVE
MEDICAL RETIREMENT PLAN,
Defendants,

Case No. 5:17-cv-02990 - BLF

**DECLARATION OF DANIEL
WARMENHOVEN IN SUPPORT OF
PLAINTIFF DANIEL
WARMENHOVEN'S OPPOSITION
TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT ON
EQUITABLE REMEDIES**

Date: October 13, 2022
Time: 9:00 a.m.
Courtroom: 3
Judge: Hon. Beth Labson Freeman

Complaint Filed: 05/24/2017

1 I, DANIEL WARMENHOVEN, declare as follows:

2 1. I am a plaintiff in this action. The following facts are within my personal
3 knowledge and if called and sworn as a witness I am competent to truthfully testify thereto. I
4 make this declaration in support of Plaintiff's opposition to Defendants' Motion for Summary
5 Judgment on Equitable Remedies.

6 2. I was employed by NetApp, Inc. ("NetApp" or "the Company") from 1994 to
7 2014. I was the Chief Executive Officer ("CEO") from 1994 until Aug, 2009 and from 1994 to
8 2014 was a member of the Board of Directors. I was the CEO in 2003 when the subject of
9 creating a Medical Plan for retired executives first arose. Jeff Allen ("Allen"), then CFO at
10 NetApp was planning to retire and advised me he was concerned about his ability to secure
11 medical insurance given a pre-existing condition as he would not be eligible for Medicare upon
12 retirement. I then directed NetApp's Human Resources ("HR") officers, Chris Carlton, Vice
13 President, and Marge Correa, the HR Director to work with the NetApp Board of Directors'
14 Compensation Committee ("Comp Committee") which had jurisdiction over all NetApp
15 employee benefits plans, to see if it was possible to devise a medical insurance plan for senior
16 executives at Allen's level.

17 3. After nearly two years of consideration, the Comp Committee, comprised of
18 Board members Carol Bartz, Bob Wall and Mark Leslie, adopted an Executive Medical
19 Retirement Plan (the "Plan") on behalf of the Committee in May, 2005. The Plan, chiefly
20 drafted by Ms. Correa, was set forth in a Power Point, a true and correct copy of which is
21 attached hereto as **Exhibit 1**. No other documents were created by NetApp relating to the Plan at
22 that time.

23 4. At the same time, NetApp changed the insurance company which administered
24 the NetApp employee medical plan from Great West to Cigna Insurance Company ("Cigna").
25 Cigna, in turn, became the administrator of the Plan, which then only had one beneficiary, Allen,
26

1 who retired as a full time NetApp employee in May, 2005 and then became a member of the
2 Board of Directors.

3 5. As stated in the Plan (Exhibit 1) it was designed to confer lifetime medical
4 benefits on the Senior Executives and their spouses with the Plan becoming supplementary to
5 Medicare when the executive and the spouse reached the age of 65. In addition, children of the
6 retired executive would be covered by the Plan until age 26. The Plan was self-funded; that is,
7 NetApp paid all premiums for the executive's coverage. Nothing in the Plan document (Ex. 1)
8 provided that NetApp could amend or terminate the Plan after an eligible executive retired and
9 he and his spouse were covered. And that was my intent and expectation when I directed the Plan
10 to be created.

11 6. At no time during my tenure at NetApp through 2015 did any member of the
12 Comp Committee or HR advise me that language in the Cigna Certificate of insurance in any
13 way created a right in NetApp to terminate the Plan. The Plan was a factor in my decision to
14 continue as CEO of NetApp until I met the age and years of service requirement to vest the
15 lifetime medical benefits upon my retirement.

16 7. Cigna was replaced as the NetApp employee medical plan insurance administrator
17 in 2013 in favor of United Healthcare ("UHC"). Similar to Cigna, UHC then became the
18 administrator of the Plan which by 2013 had two additional beneficiaries – Steve Gomo, the
19 Chief Financial Officer who retired in early 2011 and Edward Deenihan who retired in 2013.
20 UHC also prepared Certificates of Insurance it provided to NetApp. Nothing in the UHC
21 Certificate I saw purported to delegate to NetApp the right to amend or terminate the Plan.

22 8. Shortly before my retirement as CEO in 2014 I was given a copy of the Plan, still
23 in the form of the Power Point presentation. A true and correct copy of that document dated
24 March 2014, is attached hereto as **Exhibit 2**. Other than a slight to change the pool of eligible
25 senior executives from SEC Section 16b officers to Executive Vice Presidents, the terms of the
26

1 Plan were the same since its inception: a lifetime benefit for myself and my wife and for my
 2 children until age 26. In none of the communications with HR about my impending retirement
 3 and eligibility for the Plan was there any suggestion the Plan could be amended or terminated
 4 and no such language was contained in Exhibit 2.

5 9. In the summer of 2016, I was advised by both George Kurian, then the CFO, and
 6 Gwen McDonald, HR Executive Vice President, that the Comp Committee had decided to
 7 terminate the Plan and substitute, for a period of 3 years, individual insurance policies for all
 8 Plan beneficiaries (including myself) and then end the Plan in December, 2019 with a payment to
 9 be made to beneficiaries subject to signing a release agreement. I attended a meeting with
 10 Kurian, McDonald, and most of the beneficiaries on August 25, 2016 and received documents
 11 explaining the new Plan. At no time in that meeting, or later in meetings and conversations I had
 12 with Kurian, McDonald, and NetApp Board of Director Chairman Mike Nevins, did any NetApp
 13 officer explain the source of the Company's claimed right to terminate the Plan. There was no
 14 mention of ERISA or that the Plan was part of the insurance documents now before the Court.
 15 The word ERISA was never raised or mentioned by the Company until this lawsuit was initiated.

16 10. As with all the other Plan beneficiaries I purchased individual policies with
 17 Anthem Blue Cross and Express Scripts that was supplementary to Medicare coverage for which
 18 I became eligible in 2015. My wife also became Medicare eligible and our Medicare premiums
 19 combined are approximately \$1,006,80 per month. The supplemental plans with Anthem &
 20 Express Scripts cost approximately \$430.00 per month for both of us combined, which we are
 21 still paying to date.

22 I declare the foregoing to be true under penalty of perjury. Executed this 4th day of July,
 23 2022 in Mountain View, California.

24 
 25 DANIEL WARMENHOVEN

EXHIBIT 1

WARMENHOVEN 699



Executive Retirement Medical Plan

CONFIDENTIAL



Executive Retirement Medical Plan

- ▶ Provide medical coverage beyond the COBRA maximum benefit period to a defined group of retiring executives as a fully-insured plan
- ▶ Participation
 - Minimum 5 years of service
 - Minimum age 50
 - Retired 16b officers (all executives who are or have been 16b officers)
 - Easily identified group – no question as to who is eligible
 - Substantially different responsibilities when compared to other executives
 - Small group - limits the cost - time to evaluate the impact
 - Age + (years of service doubled) is equal to or greater than 65
 - Coverage for retiring executive and spouse/eligible children if applicable
- ▶ Implement May 1, 2005



Executive Retirement Medical Plan – con't

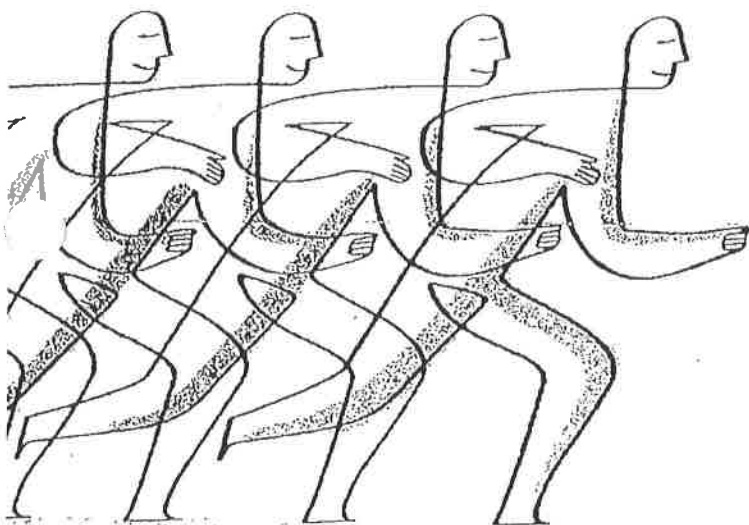
- ▶ CIGNA HealthCare Open Access Plus plan for Retirees
 - Fully insured Plan (Highlights document attached)
 - Rate Structure through 12/31/06
 - Employee only \$740.26
 - EE + Spouse \$1,470.03
 - EE + Family \$2,747.11
 - 100% paid by Company - no premium contribution from retiree
 - Medicare COB with Medicare primary
 - Unlimited lifetime maximum benefit

- ▶ Change of Control provision
 - Plan will include a provision such that in the event of a change of control, the acquiring company must provide a Retiree Medical Plan that is substantially equivalent to our Plan and keep the Plan in place for the lives of the eligible employees

EXHIBIT 2

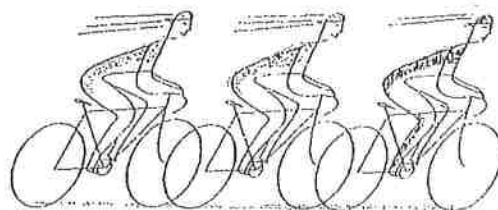


Go further, faster™



Executive Medical Retirement Plan

March 2014



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NETAPP 001825





Executive Medical Retirement Plan

- Executive Medical Retirement Plan adopted by the Company as a method to retain a defined group of senior executives
- Plan provides medical benefits for the retiree's lifetime
- Eligibility:
 - Executive Vice President or above
 - Age and Service Requirements
 - Minimum age 50, and
 - Age plus 2 x Service => 65



Executive Medical Retirement Plan

- No retiree contributions required
- Eligible dependents include spouse/partner and children
- Benefits coordinated with Medicare for retirees age 65 and above
- Medical benefits are fully insured with UnitedHealthcare
 - Plan design is a PPO (90% network/80% out-of-network)



Medical Plan Design

Benefit Provision	In-Network	Out-of-Network
Annual deductible	\$250/\$750 (indiv/family)	\$250/\$750 (indiv/family)
Office visit	\$20 copay	20% of charges ²
Lab & X-ray	10% of charges ¹	20% of charges ²
Outpatient services	10% of charges ¹	20% of charges ²
Inpatient hospital	10% of charges ¹	20% of charges ²
Emergency room	\$100 copay	\$100 copay or 20% ³
Annual Out-of-Pocket Maximum	\$1,500/\$3,000 ⁴	\$5,000/\$10,000 ⁴
Lifetime maximum	Unlimited	Unlimited

¹ Services are subject to calendar year deductible

² Services are subject to calendar year deductible and reasonable & customary charge limitations

³ Care provided at in-network levels if it meets 'prudent layperson' definition of an emergency. Otherwise 20% of charges

⁴ Includes plan deductible